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No. 73-591

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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THOMAS J. EPPS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that his surrender of stolen money during the course of station house questioning constituted an unreasonable search and seizure.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of an indictment charging him with unlawful and knowing possession of money stolen from a bank, in violation of 18 U.S.C. 2113(b).[1] He was sentenced to a term of ten years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

On December 29, 1972, agents of the Federal Bureau of Investigation encountered petitioner in the course of investigating a bank robbery that had taken

[1] He was acquitted on a count charging bank robbery, in violation of 18 U.S.C. 2113(a) and (d).

place earlier that day (Tr. 57).[2] Identifying themelves, they expressed a desire to discuss the robbery with him. They gave petitioner a form setting forth the *Miranda* warnings and read them to him (Tr. 58-59). Petitioner indicated that he understood his rights, but declined to sign the waiver form (Tr. 59, 61).[3] He then denied any knowledge of the bank robbery (Tr. 63-64).

The agents asked permission to search the car in petitioner's possession, and petitioner agreed. Once it was discovered that the car was not registered to him, the agents stated that they wanted the consent of its owner before proceeding (Tr. 63-64). Followed by the officers, petitioner drove to the home of the owner, where consent to search was obtained. The search did not uncover any evidence (Tr. 64-65).

Although he was not under arrest, petitioner agreed to drive to police headquarters, stating that "he wanted to get the matter straightened out" (Tr. 66). At the police station, the agents asked petitioner whether he had any money with him, and he replied that he had five hundred dollars. The agents then asked to see the money. Petitioner, apparently concerned about the return of the money, "indicated that he—he would like to have the money put into an envelope and sealed, with the amount written on it, and then signed by the agents and himself, and to have it opened in the presence of his attorney" (Tr. 67-68). Agent Bunszel testified further

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[2] "Tr." refers to the transcript of the proceeding held on February 26, 1973.

[3] Petitioner claims that at this time he requested counsel (Tr. 81). Agent Bunszel testified, however, that no such request was made until petitioner was asked to produce for inspection the money in his possession at the police station (Tr. 62). The trial court expressly rejected petitioner's contention in this regard (Tr. 96).

that, "in talking with him a moment further it was obvious that he was under the impression that we planned to keep the money, and as soon as it was clear to him that we only wanted to look at it he was perfectly agreeable to showing it to us" (Tr. 68). After recording the serial numbers of the bills, the agents returned the money. Two hours later petitioner was placed under arrest and the money was confiscated (Tr. 76-77).

The record establishes that petitioner's initial reluctance to produce the money rested entirely on the fear that it would not be returned in full. In fact, petitioner never refused to produce it; he simply requested that certain conditions be met—including the presence of counsel—to ensure its safety before he relinquished possession. Once assured of prompt return, however, petitioner dropped his request and agreed to give up the money, stating that he had "no objections" to showing the officers the money in order "to clear himself" (Tr. 70). With regard to the issue of presence of counsel, the trial court observed that "[a]t no time did [petitioner] indicate that he wanted a counsel unless the agents were then going to take his money away from him, and if they were going to deprive him of his money then he did wish it placed in an envelope," that envelope to be signed, sealed, and then opened in the presence of his attorney (Tr. 96-97).[4] The court concluded that "when it was made clear to him that [the agents] did not intend to take his money from him at that time he freely and voluntarily furnished them with the money" (Tr. 97). There is no reason for further review of this basically factual finding.

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[4] We note further that the failure to sign a waiver does not impair the voluntariness of a consent, if it is shown that the suspect was properly informed of his rights and freely and voluntarily consented. *United States* v. *Thompson*, 417 F. 2d 196 (C.A. 4).

Petitioner claims further that the consent he gave at the police station was the result of "submission to apparent authority of an officer" (Pet. 7). This, however, is not a case like *Bumper* v. *North Carolina,* 391 U.S. 543, where officers misstated their authority in order to gain entry to private premises. Here as the trial court stated "beyond any question * * * before any questioning of the defendant was conducted the defendant was fully advised of and understood his constitutional rights" (Tr. 96). The court noted further that petitioner "agreed to accompany [the agents] to the police station and there to continue to answer questions" (Tr. 96). At the police station, petitioner was free to leave at any time prior to his arrest. Petitioner does not allege that any attempt was made to restrain his movements. In short, the record is completely free of any hint of deceit, duress, or coercion, express or implied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1973.

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